



Suchan Investments Limited v Minar Katherine Holroyd, Suneina Leonora Pulling & Laura Sushila Pulling (Being the co-administrators of the Estate of the Late Dipa Jashbai Pulling (Deceased)) (Environment & Land Case 1142 of 2016) [2022] KEELC 2889 (KLR) (26 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2889 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1142 OF 2016**

LN MBUGUA, J

MAY 26, 2022

BETWEEN

SUCHAN INVESTMENTS LIMITED PLAINTIFF

AND

MINAR KATHERINE HOLROYD, SUNEINA LEONORA PULLING & LAURA SUSHILA PULLING RESPONDENT

BEING THE CO-ADMINISTRATORS OF THE ESTATE OF THE LATE DIPAJASHBAI PULLING (DECEASED)

RULING

1. Coming up for determination is a Notice of Preliminary Objection dated 24th November 2021 by the Estate of the Defendant seeking the striking out of the Plaintiff's suit on grounds that:
 - i. In line with Section 7 (Res Judicata) of the *Civil Procedure Act* Cap. 21, the plaintiff's present suit has been overtaken by events and is Res-judicata to the Judgment delivered by Hon. Justice Okong'o on 21st November 2019 in ELC No. 200 of 2008. The said Judgment dismissed the plaintiff's Counter-Claim thereto dated 29th May 2008 and amended on 25th February 2009 seeking similar Orders to the suit hereto. The said Judgment has never been set aside, reviewed or varied and therefore remains in full force and effect.
 - ii. In line with Section 8 (Actions to recover Rent) of the *Limitation of Actions Act* Cap. 22, the present suit which is an action for recovery of rent and mesne profits is statute barred for being filed more than six (6) years after the cause of action arose on 29th April 2008.



- iii. Consequently, this Honourable Court has no jurisdiction to hear and determine the Plaintiff's suit.
2. The background to the dispute herein is well captured in the Judgment delivered on 21.11.2019 in ELC 200 of 2008 and in a Court of Appeal judgment dated 4.3.2016 in Civil Appeal No.46 of 2012. In summary, the suit property LR. 209/1916/6 was via a deed of assent dated 27.10.1995 transferred to the deceased defendant (Dipa Pulling), Sandeep Rajni Desai, Niranjana Jashbhai Desai and Kevit Subash Desai, hereafter, Dipa, Sandeep, Niranjana and Kevit respectively as tenants in common, the said land having been bequeathed to them earlier by one Jashbhai Motibhai Desai. Niranjana and Kevit subsequently sold their shares in the suit property to the plaintiff herein.
3. Dipa, (now deceased) instituted a suit ELC 200 of 2008 through a plaint filed on 29.4.2008 seeking orders:
- “a permanent injunction restraining the 1st Defendant from accessing the suit property for the purposes of destroying and/or demolishing the buildings thereon or any of them, a declaration that the plaintiff was entitled to quiet enjoyment of the suit property and, a declaration that the suit property being a National Monument could not be destroyed.”
4. Suchan Investment Limited, the current plaintiff was sued as the 1st defendant in the suit ELC 200 OF 2008 in which he filed a defence and a counterclaim praying inter-alia for the partitioning of the suit property. Judgment in the aforementioned suit was delivered on 21.11.2019.
5. It came to be that the suit property was gazetted as a national monument vide a legal notice NO. 128 dated 17.9.2008, triggering the filing of a Judicial Review suit No. 129 of 2009. The suit was initiated by Suchan as the ex parte applicant where it sought orders of certiorari to quash the aforementioned legal notice. Vide a judgment delivered on 21.7.2011, Suchan lost the Judicial Review case and it promptly moved to the Court of Appeal vide the case Civil Appeal No. 46 of 2012 in which, vide a judgment delivered on 4.3.2016, Suchan won the appeal.
6. Few months later on 19.9.2016, Suchan lodged the current suit against Dipa (deceased) seeking the following orders;
- a. Loss of rent for approximately 8 years at the rate of Kshs. 150,000/- per month – Kshs. 14,400,000/- till payment in full.
 - b. Mesne Profit – Kshs 10,000,000/-
 - c. General Damages calculated at the rate of 5% annually of the purchase price for 8 years – Kshs 18,000,000/-.
 - d. Costs of this suit.
 - e. Interest at Court rate.

Case for the Defendants

7. The gist of the Preliminary Objection of the defendants is that the Plaintiff's suit was overtaken by events and is Res Judicata since the Plaintiff's counterclaim dated 29th May 2008 and amended on 25th February 2009 in ELCC No. 200 of 2008 was dismissed on 21st November 2019 vide the judgement delivered by Justice Okong'o and the said judgement is still in force.



8. It was submitted for the defendants that this Court has no jurisdiction to hear and determine the amended Plaintiff, that the Preliminary Objection had been raised at the earliest opportunity and is meritorious. Defendants relied on the case of *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd* (1989) eKLR and *Mukhisa Biscuit Manufacturers Ltd. vs. West End Distributors Ltd.* (1969) E.A. 696.
9. It was further submitted that litigation must come to an end as embedded in Section 7 of the *Civil Procedure Act*. It was argued that the Plaintiff had filed multiple suits over the property LR No. 209/1916/6, with similar parties and seeking similar reliefs as the one in the amended plaintiff in this current suit wherein the matters were substantially heard and determined. More specifically the Counterclaim dated 25th February 2009 in ELCC 200 of 2008 where the Plaintiff sought for payment of rent, mesne profits and general damages was dismissed on 21st November 2019. Reference was made to the case of *E.T vs. Attorney General & Another* (2012) eKLR where the court held: "The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court..."
10. It was submitted that in filing a suit with prayers that had already been dismissed was forum shopping and an abuse of the Court process contrary to Section 1A of the *Civil Procedure Act* and as such, the suit should be struck out.

Case for the plaintiff

11. It was submitted for the Plaintiff that the preliminary objection is not a pure point of law and that the facts raised therein required evidence to ascertain them. Reference was made to the case of *Sauti Africa Ltd vs Cheraik Management Limited & Another* (2012) eKLR where it was held that: "... A preliminary Objection ... cannot be entertained where there is a dispute as to facts..." . The cases of *Litien Tea Factory Company Limited vs Davis Kiplagat Mutai & 5 Others* (2015) eKLR and *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors* (1969) EA 696 were also cited in support of the aforementioned averment.
12. It was further submitted that the suit was not time barred stating that the cause of action in the current suit arose after the Court of Appeal judgement dated 4th March 2016 which discharged the injunction enjoyed by the deceased and the current suit was filed on 9th September 2016.
13. It was also submitted that the rules of natural justice postulated that no person should be condemned unheard as enshrined in Article 159(d) of *the Constitution*., hence courts should be careful in dismissing cases as was stated in the case of *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR.

Analysis and determination

14. The single issue for determination is; Whether the

Defendant's Preliminary Objection dated 24th November 2021 is meritorious?
15. As submitted by the parties, the precedent setting case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors* (1969) EA 696 clearly advanced grounds/ principles governing a preliminary objection. This principle was also buttressed in the Supreme Court of Kenya case of *Hassan Ali Joho & Another vs. Suleiman Said Shahbal & 2 Others* (2014) eKLR and re-emphasised in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR.



16. In essence, a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

17. The legal framework upon which the doctrine of res-judicata is anchored upon is to be found under Section 7 of the [Civil Procedure Act](#) which stipulates that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

18. In the case of [John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others](#) [2015] eKLR, the court had this to say in regard to the doctrine of res-judicata;

“The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata... Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue”.

19. I have keenly perused the Judgment of Judge Okongo in ELC No. 200 of 2008. While determining the question as to “Whether the 1st Defendant (read Suchan) is entitled to the reliefs sought, the court had this to say in the above case:

“I will now consider the reliefs sought in the 1st Defendant’s Counter-claim. The 1st Defendant as stated earlier, sought, partition of the suit property, access to the portion of the suit property allocated to it, assessment of fair market rent for the buildings on the suit property, fair share of the rent realised from the suit property since 18th February, 2008, mesne profits, general damages and costs of the suit.

As tenant in common, the 1st Defendant is entitled to joint possession of the suit property with the other co-owners. The 1st Defendant is also entitled to insist that the suit property be partitioned if there is no agreement between the co-owners of occupation and use of the property like in the present case.”

20. It is crystal clear that the issues set out for determination by Suchan in the current suit were equally put forth for determination in the previous suit (ELC. 200 OF 2008).

21. The court in the aforementioned suit went on to determine the issues as follows:

“On the 1st Defendant’s rent claim, the Plaintiff and the 2nd Defendant have a right to occupy the suit property. They are therefore not liable to pay rent to the 1st Defendant. As to whether part of the property is occupied by rent paying tenants, no evidence was placed before the court in proof of that fact. The 1st Defendant would be entitled to a share of rental income from the suit property proportionate to its share if there were tenants on the property. The same applies to the 1st Defendant’s claim for mesne profits. The Plaintiff and the 2nd Defendant are not trespassers on the suit property and as such are not liable to pay mesne profits to the 1st Defendants.



The 1st Defendant's last claim was for general damages. No basis was laid for this claim. The 1st Defendant produced in evidence a valuation report in which its loss for being kept out of the suit property was assessed at Kshs 147,000,000/-. As I have stated earlier in this judgment, the 1st Defendant did not purchase any particular or specific portion of the suit property. The 1st Defendant's entry onto the suit property was resisted because the 1st Defendant forcefully laid a claim to a portion of the suit property which resulted in the Plaintiff and subsequently the 2nd Defendant obtaining an injunction to restrain its interference with the suit property. The Plaintiff and the 2nd Defendant are in the circumstances not liable to the 1st Defendant for its alleged loss. Instead of bulldozing its way onto the property, the 1st Defendant should have sought a legal remedy against the 2nd Defendant who was in possession of the property and who was against his entry onto the property."

22. There is no rocket science in discerning that the issues raised by the Plaintiff in the current suit were determined in the former suit. This court cannot cloth itself with appellate attires over the decision of my brother Judge Okong'o.
23. Further, it is noted that in the conclusion part of the aforementioned Judgment in ELC. 200 OF 2008, the court gave an elaborate step by step account of what the parties should do to resolve the stalemate. If this court was to entertain this suit, it would in essence render the judgment delivered in ELC. No. 200 of 2008 Otiose.
24. I must however point out that I do not consider the claim of Suchan as being time barred. This is because firstly its claim is continuous in being a co-owner of the suit property. Secondly, it is noted that as long as the proceedings in Judicial Review case persisted, Suchan's claim to the suit property was held in abeyance only being revived by the Court of Appeal decision in Civil Appeal No. 46 of 2012 which quashed the legal notice that had declared the suit property as a National Monument. Thirdly, it is apparent that orders of injunction had been granted against Suchan in the ELC. suit 200 of 2008.
25. In the end, I find that the Preliminary Objection is merited on the basis of being Res Judicata to ELC. 200 OF 2008. On costs, I find that the Plaintiff has waited for years to enjoy his rights over the suit property but to no avail. It would be unjust to condemn them to pay costs of this suit.
26. In that regard, this suit is hereby struck out and each party is to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Amamo for the Defendant/Applicant

Mwaura for A.G. N. Kamau for the Plaintiff/Respondent

Court Assistant: Eddel

